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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 194

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 2, 1965, affirming the District Court's order and judgment on damages and judgment entered July 20, 1962 affirming the District Court's issuance of an injunction.

Citation to Opinions Below

The Order of the District Court issuing an injunction (I, 611 Case No. 5962)[1] is printed in Appendix B hereto

[1] References are to the certified copy of the record as follows: Case No. 5962: Vol. I, II (Record Appendix to Brief for Appellant) Vol. III, IV (Record Appendix to Brief for Appellee) Case No. 6137:

infra p. 46. Its findings of Fact and Conclusions of Law (I; 599, ibid) are reported at 200 F. Supp. 149 (D. Mass 1961). The opinion of the Court of Appeals affirming that order (IV 1071 ibid) is printed in Appendix B hereto, infra p. 13 and is reported at 307 F.2d 458. The Judgment of the District Court, entered March 13, 1963, awarding damages, appears at I, 21 Case No. 6137. The opinion of the Court of Appeals vacating that judgment and remanding the case is printed in Appendix B infra p. 35 and reported at 325 F.2d 580 (1st Cir. 1963). The Order and Judgment of the District Court entered June 8, 1964, on damages (I, 82-83 Case No. 6383) is printed in Appendix B hereto infra p. 44 and is not reported. The Opinion of the Court of Appeals affirming that Order (II 91 ibid) is printed in Appendix B hereto infra p. 41 and is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered April 2, 1965 (II, 93 Case No. 6383) p. 43 infra. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), as is jurisdiction to reach back and correct errors in affirmance of the issuance of injunction in Case No. 5927, *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, 257-258; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418.

Questions Presented

1. Whether respondent, which controls twenty per cent of the United States mattress market, and has entered into tying arrangements found to be within the meaning of Section 3 of the Clayton Act with its customers for the ex-

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Combined Volume (Record Appendices to Brief for Appellant and to Brief for Appellee), Case No. 6383: Vol. I (Record Appendix to Brief for Appellant) Vol. II (Record Appendix to Brief for Appellee.)

clusive use of its mattresses, is exculpated from a violation of the Clayton Act, because actuated by a "proper motive".

2. Whether, in an action for unfair competition and trade-mark infringement under the Lanham Act (15 U. S. C. 1114 et seq), proof of plaintiff's use of the mark to violate the anti-trust laws constitutes a bar to the action.

3. Whether petitioner was prejudiced in his right to a fair hearing and denied due process of law when the District Court Judge, upon remand of the case to the District Court for assessment of damages, in a conference before the master, called defendant a "crook" and otherwise excoriated him, while the hearing before the master was in progress.

Statutes Involved

The statutory provisions involved are Section 1 of the Sherman Act 15 U. S. C. Section 1; Section 3 of the Clayton Act 15 U. S. C. 14; Section 33 b (7) of the Trade Mark Act of 1946, 15 U. S. C. 1115 b (7). They are printed in Appendix A *infra* pp. 11, 12.

Statement

On October 10, 1958 respondent instituted in the District Court an action for unfair competition and trade-mark infringement, seeking to enjoin defendants, from using the name "Simmonds" in connection with the business of selling upholstering or reupholstering or otherwise servicing furniture and for damages. Petitioner denied infringement (I, 17 Case No, 5289) and set up as defenses respondent's laches, violations of the anti-trust laws, and unclean hands as bar to the action. The trial was before McCarthy J., lasted fifty (50) days, and resulted in Findings of Fact and Conclusions of Law (I, 599 *ibid*) and an Injunction (I, 611) both entered November 16, 1961 enjoining petitioner and others from using the name "Simmonds" or "any other